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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE EVAN MORRIS,

Defendant and Appellant.

H040703

(Monterey County

Super. Ct. No. SS082265)

Defendant Wayne Evan Morris is currently serving a “Three Strikes” life sentence for a 2009 conviction for possession of a weapon by a prisoner (Pen. Code, § 4502, subd. (a)).¹ He challenges the superior court’s denial of his section 1170.126 petition seeking resentencing. Defendant claims that the superior court erred in finding that he was ineligible for resentencing because he was “armed with a deadly weapon” during his commission of the possession offense. (§ 1170.126, subd. (e)(2).) We reject his contention and affirm the order.

¹

Subsequent statutory references are to the Penal Code.

I. Background

In April 2007, while defendant was incarcerated at Salinas Valley State Prison, he was found in possession of a concealed piece of plastic that was five inches long and had been sharpened at one end so that it could be used as a stabbing instrument. Defendant admitted that he had manufactured and possessed this sharp instrument. He also admitted that he had manufactured a second weapon, which was also a sharp instrument that could be used as a stabbing instrument, found in the possession of another inmate. Defendant admitted that he had earlier been secreting both sharp instruments on his person.

Defendant was charged by information with two counts of possession of a “sharp instrument” by an inmate, and it was further alleged that he had three prior strike convictions. He entered into a plea agreement under which he pleaded no contest to one of the two counts, admitted the prior strike allegations, and agreed to be sentenced to 25 years to life. Defendant agreed that the factual basis for his plea was the preliminary examination transcript and the information. The court sentenced him to 25 years to life consecutive to his existing prison term.

In June 2013, the Monterey County Public Defender’s Office filed a petition on defendant’s behalf under section 1170.126 seeking resentencing on his 2009 conviction. In January 2014, the court denied the petition “due to his current conviction for being an inmate in possession of a deadly weapon (§4502, subd. (a)).” The court concluded that defendant had been “armed with a deadly weapon” during the commission of the possession offense and was therefore ineligible for resentencing under section 1170.126. The court pointed out that the preliminary examination transcript reflected that the weapon defendant had possessed was sharpened at one end so that it could be used as a stabbing instrument and that defendant had it available for offensive or defensive use. Defendant timely filed a notice of appeal from the court’s order denying his petition.

II. Discussion

Defendant asserts that his current conviction for violating section 4502, subdivision (a) did not preclude eligibility for resentencing under section 1170.126, subdivision (e).

“An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate’s current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” (§ 1170.126, subd. (e).)

The only eligibility criterion at issue here is section 1170.126, subdivision (e)(2). An inmate is eligible only if his or her “current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive” (§ 1170.126, subd. (e)(2).) The cross-referenced “clauses (i) to (iii)” read: “(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true. [¶] (ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314. [¶] (iii) During the commission of

the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).)

Only the third clause is at issue here. It applies where the defendant was “armed with a . . . deadly weapon” “[d]uring the commission of the current offense.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Citing *People v. Blakely* (2014) 225 Cal.App.4th 1042 (*Blakely*), defendant contends that his possession conviction did not disqualify him under section 1170.126, subdivision (e)(2). In *Blakely*, the defendant’s current offense was possession of a firearm by a felon. The trial court found that his conviction *alone* did not make him ineligible under section 1170.126, but it concluded that he was ineligible because the facts of his offense showed that he had been armed and had used the firearm during his offense. (*Blakely*, at pp. 1050-1051.) The Court of Appeal agreed that the defendant’s conviction alone did not disqualify him under section 1170.126, subdivision (e)(2). (*Blakely*, at p. 1051.) It pointed out that “armed” with a weapon meant that the weapon was “available for use, either offensively or defensively.” (*Id.* at p. 1051.) Since a weapon “can be under a person’s dominion and control without it being available for use,” the court held that a conviction for possession alone is not enough to disqualify an inmate. (*Id.* at pp. 1052, 1054.) However, an inmate convicted of a weapon possession offense is disqualified if the trial court finds, based on the record of conviction, that the weapon was available for use during the commission of the possession offense. (*Id.* at p. 1054.)

Defendant criticizes the *Blakely* court’s construction of the section 1170.126, subdivision (e)(2) eligibility criterion. He asserts that section 1170.126, subdivision (e)(2)’s cross-reference to “offenses appearing in clauses (i) to (iii)” does not incorporate the circumstances described in clause (iii) because those circumstances do not constitute “offenses.” We must reject his argument because it would render nugatory section 1170.126, subdivision (e)(2)’s express cross-reference to clause (iii). “[A] statute

should not be given a construction that results in rendering one of its provisions nugatory.” (*People v. Craft* (1986) 41 Cal.3d 554, 560.) We cannot conclude that the voters’ express cross-reference to clause (iii) failed to incorporate its circumstances into section 1170.126, subdivision (e)(2)’s eligibility criterion because that would give that cross-reference no purpose whatsoever.²

Defendant claims that he could not be found ineligible under section 1170.126, subdivision (e)(2) without proof of a “facilitative nexus” between his offense and the weapon. This contention has been rejected by our colleagues in the Fifth District (*People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*)) and the Fourth District (*People v. Brimmer* (2014) 230 Cal.App.4th 782 (*Brimmer*)). “In *Osuna*, *supra*, 225 Cal.App.4th 1020, the defendant argued he was not ineligible for resentencing under section 1170.126, subdivision (e)(2), because a finding of being armed with a firearm had to be tethered to an underlying conviction or there had to be a “facilitative nexus” between the arming and the possession. (*Osuna*, at p. 1030.) The appellate court agreed tethering and a “facilitative nexus” are required when imposing an “armed with a firearm” sentence enhancement under section 12022. (*Osuna*, at pp. 1030–1031.) ‘However, unlike section 12022, which requires that a defendant be armed “in the commission of” a felony for additional punishment to be imposed (*italics added*), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm “during the commission of” the current offense (*italics added*). “During” is variously defined as “throughout the continuance or course of” or “at some point in the course of.” [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]’ (*Id.* at

² Defendant’s contention was also implicitly rejected by the Third District Court of Appeal in *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*). (*Bradford*, at p. 1333.)

p. 1032.) ‘Since the Act uses the phrase “[d]uring the commission of the current offense,” and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.’ (*Ibid.*)” (*Brimmer, supra*, 230 Cal.App.4th at pp. 798-799.) Since we agree with the analysis in *Osuna* and *Brimmer*, we reject defendant’s contention that a “facilitative nexus” was required.

Defendant argues that the trial court erred in finding him ineligible under section 1170.126, subdivision (e)(2) because, although he possessed “sharp instruments,” they were not “deadly weapons.” “[A] ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

The trial court, as the trier of fact, could reasonably conclude from the record of conviction that the relevant facts and the nature of the objects demonstrated that both of the sharp instruments that defendant had secreted on his person were deadly weapons. Each of them had been sharpened at one end so that it could be used to stab someone. Defendant, an inmate in state prison, had manufactured these sharp instruments himself and secreted them on his person when he was going to be around other prisoners. The circumstances of defendant’s possession of these sharp instruments reflected that they

were designed to be used to inflict great bodily injury and possessed for such use. Hence, they were deadly weapons.

Defendant repeatedly asserts that he was “never adjudicated” to have possessed a “deadly weapon.” However, the trial court’s denial of his petition was based on its finding that he was armed with a “deadly weapon.” The trial court’s ruling was an “adjudication” that he was armed with a deadly weapon during his commission of the possession offense. The preliminary hearing transcript and the information, which were the basis for defendant’s no contest plea, provided substantial evidence supporting the court’s finding. An inmate’s creation of a sharp instrument with a sharp point at one end so that it may be used as a stabbing instrument and concealment of that instrument while he is around other inmates supports a finding that the instrument was a deadly weapon. “A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively” “at any time during the commission” of the offense. (*People v. Bland* (1995) 10 Cal.4th 991, 997, 999.) Since defendant was armed with these deadly weapons during his possession of them, he was ineligible for resentencing.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Márquez, J.